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3           UNITED STATES DISTRICT COURT  
4           WESTERN DISTRICT OF WASHINGTON  
5           AT TACOMA

6 STATE FARM FIRE AND CASUALTY  
7 COMPANY,

8           Plaintiff,

9 v.  
10 SEAN H. DOUCETTE, et al.,

11           Defendants.

12           CASE NO. C16-5169BHS

13           ORDER DENYING MOTIONS  
14           FOR SUMMARY JUDGMENT

15         This matter comes before the Court on Plaintiff State Farm Fire & Casualty  
16 Company's ("State Farm") motion for summary judgment (Dkt. 16), Defendants Rachel  
17 and Sean Doucette's ("Doucettes") motion for summary judgment (Dkt. 18), and  
18 Defendant Ilya Dumittrash's, as personal representative of the estate of Iosif Dumittrash  
19 ("Estate"), motion for summary judgment (Dkt. 19). The Court has considered the  
20 pleadings filed in support of and in opposition to the motions and the remainder of the  
21 file and hereby rules as follows:

22           **I. PROCEDURAL AND FACTUAL BACKGROUND**

23         In an underlying state court action, the Estate sued Mr. Doucette for the wrongful  
24 death of Iosif Dumittrash. Dkt. 1, Exh. A ("State Comp."). The Doucettes filed a claim  
25 under their insurance policy with State Farm seeking defense and indemnity. State Farm

1 filed this action seeking a declaration that it has no duty to defend and no duty to  
2 indemnify.

3 **A. The Policy**

4 On May 1, 2012, the Doucettes renewed their homeowners' insurance policy with  
5 State Farm covering the period from June 17, 2012 to June 17, 2013. Dkt. 17,  
6 Declaration of Mary R. DeYoung, Exh. F ("Policy"). In relevant part, the Policy  
7 provides as follows:

8 **SECTION II – LIABILITY COVERAGE**

9 **COVERAGE L – PERSONAL LIABILITY**

10 If a claim is made or a suit is brought against an insured for damages  
because of bodily injury or property damage to which this coverage applies,  
11 caused by an occurrence, we will:

- 12 1. pay up to our limit of liability for the damages for which the  
insured is legally liable; and  
13 2. provide a defense at our expense by counsel of our choice. We  
may make any investigation and settle any claim or suit that we decide is  
14 appropriate. Our obligation to defend any claim or suit ends when the  
amount we pay for damages, to effect settlement or satisfy a judgment  
resulting from the occurrence, equals our limit of liability.

15 The coverage is subject to the following exclusion:

16 **SECTION II – EXCLUSIONS**

- 17 1. Coverage L and Coverage M do not apply to  
18 a. bodily injury or property damage:  
19 (1) which is either expected or intended by the insured . . . .

20 The policy contains the following definitions:

1           **DEFINITIONS**

2           “You” and “your” mean the “named insured” shown in the  
3           Declarations. Your spouse is included if a resident of your household.  
4           “We”, “us” and “our” mean the Company shown in the Declarations.

5           \* \* \*

6           7. “occurrence,” when used in Section II of this policy, means an  
7           accident, including exposure to conditions, which results in:

- 8           a. bodily injury; or  
9           b. property damage;

10          during the policy period. Repeated or continuous exposure to the same  
11         general conditions is considered to be one occurrence.

12         **B. The Underlying Action**

13          On July 13, 2015, the Estate filed a lawsuit against Mr. Doucette in Clark County  
14         Superior Court for the State of Washington. In relevant part, the complaint alleges as  
15         follows:

16          [Mr. Dumittrash] spent the evening with his friends drinking  
17         alcoholic beverages at his cousin’s house. Late in the evening, [Mr.  
18         Dumittrash] called a family member because he had become inebriated and  
19         could not drive home. When the family member was unable to pick him up,  
20         [Mr. Dumittrash] left his cousin’s house for a brief walk outside.

21          [Mr. Dumittrash] wandered around the neighborhood and onto NE  
22         33rd Street in Vancouver, Clark County, Washington, eventually walking  
23         toward [Mr. Doucette]’s residence.

24          At approximately 4:00 a.m. on January 29, 2013, [Mr. Doucette]  
25         arrived home from his late night shift working as a private security guard.  
26         [Mr. Doucette] resides at 14802 NE 33rd Street in Vancouver, Clark  
27         County, Washington. [Mr. Doucette] was armed with a loaded Glock  
28         Model 17 Gen4 9mm Lugar caliber semi-automatic weapon. Upon arriving  
29         to his residence, [Mr. Doucette] walked part way into his front door  
30         threshold, whereupon he noticed [Mr. Dumittrash] across the street. [Mr.  
31         Doucette] believed [Mr. Dumittrash] was attempting to break into his  
32         neighbor’s vehicle. [Mr. Doucette] instructed his wife to call law  
33         enforcement. Rather than remain inside his home, [Mr. Doucette]  
34         proceeded to his front yard in order to confront [Mr. Dumittrash].

35          [Mr. Doucette] instructed [Mr. Dumittrash] to remain where he was  
36         until law enforcement arrived. [Mr. Dumittrash] walked up to [Mr.  
37         Doucette] and the two began a verbal altercation. [Mr. Dumittrash] was

1 exhibiting objective signs of intoxication, such as slurred speech and  
 2 difficulty walking. On information and belief, [Mr. Doucette] not only  
 3 observed [Mr. Dumitash]’ s intoxication, but also quickly observed [Mr.  
 4 Dumitash] was unarmed and did not pose a danger. After a brief verbal  
 5 altercation, [Mr. Dumitash] attempted to walk away from the vicinity. [Mr.  
 6 Doucette]—a former Marine—grabbed [Mr. Dumitash], subdued him, and  
 7 further placed him in his custody.

8 After detaining [Mr. Dumitash] and placing him on the ground,  
 9 [Mr. Doucette] drew his firearm. On information and belief, [Mr. Doucette]  
 10 allowed [Mr. Dumitash] to stand up from his seated position, but failed to  
 11 holster his weapon. [Mr. Dumitash] again sought to leave the vicinity and  
 12 [Mr. Doucette] grabbed [Mr. Dumitash], which resulted in a physical  
 13 altercation. During this altercation, [Mr. Dumitash’s] firearm discharged  
 14 multiple times, striking [Mr. Dumitash] at least once in the chest . . . .

15 State Comp. at ¶¶ 2.3–2.7. Mr. Dumitash died as a result of the gunshots. Based on  
 16 these allegations, the Estate brought a wrongful death claim and a survival claim. *Id.*, ¶¶  
 17 3.1–4.7. It is uncontested that “[b]oth causes of action assert duties [Mr.] Doucette  
 18 breached, which brought about injury and/or unreasonable risk of harm to Mr.  
 19 Dumitash.” Dkt. 19 at 6. State Farm, however, does contend that artful drafting clothes  
 20 intentional tort claims in negligence language. Dkt. 16.

#### 21 C. Reservation of Rights

22 After receiving the underlying lawsuit, Mr. Doucette tendered it to State Farm for  
 23 defense under the Policy. On July 30, 2015, State Farm agreed to provide a defense  
 24 under a reservation of rights.

## 25 II. DISCUSSION

#### 26 A. Summary Judgment Standard

27 Summary judgment is proper only if the pleadings, the discovery and disclosure  
 28 materials on file, and any affidavits show that there is no genuine issue as to any material

1 fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c).  
2 The moving party is entitled to judgment as a matter of law when the nonmoving party  
3 fails to make a sufficient showing on an essential element of a claim in the case on which  
4 the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317,  
5 323 (1986). There is no genuine issue of fact for trial where the record, taken as a whole,  
6 could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec.*  
7 *Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986) (nonmoving party must  
8 present specific, significant probative evidence, not simply “some metaphysical doubt”).  
9 See also Fed. R. Civ. P. 56(e). Conversely, a genuine dispute over a material fact exists  
10 if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or  
11 jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477  
12 U.S. 242, 253 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d  
13 626, 630 (9th Cir. 1987).

14 The determination of the existence of a material fact is often a close question. The  
15 Court must consider the substantive evidentiary burden that the nonmoving party must  
16 meet at trial – e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477  
17 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual  
18 issues of controversy in favor of the nonmoving party only when the facts specifically  
19 attested by that party contradict facts specifically attested by the moving party. The  
20 nonmoving party may not merely state that it will discredit the moving party's evidence  
21 at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W.*  
22 *Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson*, 477 U.S. at 255). Conclusory,

1 nonspecific statements in affidavits are not sufficient, and missing facts will not be  
 2 presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89 (1990).

3 **B. Duty to Defend**

4 “It is well established in this and other jurisdictions that the insurer’s duty to  
 5 defend, unlike its duty to pay, arises when the complaint is filed and is to be determined  
 6 from the allegations of the complaint.” *Holland Am. Ins. Co. v. Nat'l Indem. Co.*, 75  
 7 Wn.2d 909, 911 (1969). This duty “is based on the potential for liability.” *Truck Ins.*  
 8 *Exch. v. Vanport Homes, Inc.*, 147 Wn.2d 751, 760 (2002). Thus, “[i]f the complaint is  
 9 ambiguous, it will be liberally construed in favor of triggering the insurer’s duty to  
 10 defend.” *Id.* (citing *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wn. App. 290, 295 (1980)).  
 11 “Only if the alleged claim is clearly not covered by the policy is the insurer relieved of its  
 12 duty to defend.” *Id.* (citing *Kirk v. Mt. Airy Ins. Co.*, 134 Wn.2d 558, 561 (1998)).

13 In this case, State Farm does not solely rely on the allegations within the four  
 14 corners of the complaint in making its motion. As both the Doucettes and the Estate  
 15 contend, the claims in the underlying complaint sound in negligence. Dkt. 22 at 4; Dkt.  
 16 21 at 9. For example, the Estate alleges that Mr. Doucette owed numerous duties to the  
 17 deceased. State Comp. at ¶¶ 3.4, 4.4. Construing the complaint liberally, the Court  
 18 concludes that the complaint includes negligence claims, which are covered by the  
 19 policy. State Farm, however, requests the Court to look outside the complaint at  
 20 evidence that establishes Mr. Doucette’s intentional acts. Dkt. 16 at 13 (“The undisputed  
 21 evidence presented in the criminal action confirmed that Mr. Dumittrash was struck in the  
 22 chest by four bullets while he was advancing toward Mr. Doucette.”).

1        “There are two exceptions to the rule that the duty to defend must be determined  
2 only from the complaint, and both the exceptions favor the insured.” *Truck Ins.*, 147  
3 Wn.2d at 761. Relevant to this case, “facts outside the complaint may be considered if  
4 (a) the allegations are in conflict with facts known to or readily ascertainable by the  
5 insurer or (b) the allegations of the complaint are ambiguous or inadequate.” *Id.* (internal  
6 quotations omitted). However, “an insurer may not rely on facts extrinsic to the  
7 complaint in order to deny its duty to defend where, as here, the complaint can be  
8 interpreted as triggering the duty to defend. If in doubt, it may file a declaratory action.”

9 *Id.*

10        In this case, the parties dispute the use of facts outside the complaint as well as the  
11 consequences of those facts. First, the Estate argues that, as a matter of law, State Farm  
12 may not look outside the four corners of the complaint in challenging its duty to defend.  
13 Dkt. 22 at 2. While State Farm may not rely on facts outside the complaint in order to  
14 deny its duty to defend, neither the Estate nor the Doucette have submitted any authority  
15 for the proposition that the Court is precluded from relying on facts outside the complaint  
16 in declaring that State Farm owes no duty to defend. If the declaratory judgment court  
17 was precluded from considering facts outside the complaint, then these actions would be  
18 reduced to the simple task of construing the underlying complaint. For example, assume  
19 that an underlying complaint alleges that a particular person committed some negligent  
20 act triggering coverage. Also assume that, after the complaint was filed, the insurer  
21 discovers evidence that conclusively proves that the person was jailed in a foreign  
22 country at the time of the alleged incident and directly contradict a necessary allegation in

1 the complaint. Under the Estate's rationale, the Court would be precluded from using  
2 that evidence to enter a declaration that the underlying claim is clearly not covered by the  
3 policy. Although Washington law prevents State Farm from using that extrinsic evidence  
4 to initially deny the duty to defend, it is preposterous to argue that the Court is precluded  
5 from relying on additional evidence to support a declaration of no duty to defend.  
6 Therefore, the Court will look to the documents from Mr. Doucette's criminal  
7 proceeding.

8 Second, State Farm argues that Mr. Doucette is judicially estopped from asserting  
9 any factual rendition other than Mr. Doucette deliberately shot Mr. Dumitash in self-  
10 defense. The problem with State Farm's argument is that, even if Mr. Doucette is  
11 steadfast in his story of intentional self-defense, the complaint alleges a "physical  
12 altercation" and that shots were fired striking Mr. Dumitash in the chest. State Comp. at  
13 ¶ 2.7. Thus, liberally construed, there exists a potential for liability under a theory of  
14 negligence because State Farm has failed to submit undisputed facts establishing the  
15 circumstances surrounding the shooting. This is not "inconsistent" with Doucette's  
16 assertion of self-defense because his current position is that the Estate is suing him for  
17 negligence. It is no secret that juries are unpredictable, and the potential exists for a jury  
18 to conclude that the Doucettes are liable for the claims in the complaint. Until that  
19 potential liability is decided in the Doucettes' favor, what Doucetee may or may not

20

21

22

1 testify to is irrelevant.<sup>1</sup> Accordingly, the Court concludes that facts outside the complaint  
 2 are not in “conflict” with allegations in the complaint because two versions of the same  
 3 story may coexist and must be resolved by a jury.

4 Third, the cases State Farm cites do not undermine the Court’s conclusion because  
 5 none of them involve a physical altercation when the shooting occurred. Instead, the  
 6 cases involve clear and undisputed intentional shootings. *See Grange Ins. Co. v.*  
 7 *Brosseau*, 113 Wn.2d 91, 96 (1989) (“Brosseau’s statement establishes that he pumped  
 8 the shotgun, aimed it at Anderson, and pulled the trigger.”); *Safeco Inc. Co. v. Butler*, 118  
 9 Wn.2d 383, 400 (1992) (“It is undisputed that Butler intentionally fired his gun at  
 10 Zenker’s truck”); *Allstate v. Raynor*, 93 Wn. App. 484, 492 (“Milton had entered the  
 11 Johnson property and started shooting.”); *Allstate Ins. Co. v. Bauer*, 96 Wn. App. 11, 12  
 12 (1999) (“Bauer claims that the shooting was an accident because he mistakenly believed  
 13 that the deceased was armed”); *State Farm Fire and Cas. Co. v. Parrella*, 134 Wn. App.  
 14 536, 541 (2006) (“Carolanne Potts argues the incident was an accident because Anthony  
 15 did not intend to hurt her son. But his subjective intent is not relevant.”). Therefore, the  
 16 Court denies State Farm’s motion without prejudice on the issue of a duty to defend  
 17 because it is possible that the facts alleged in the complaint trigger the potential for  
 18 liability.

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20       <sup>1</sup> Although no party has identified this issue, it seems that Doucette will never change his  
 21 story that the shooting was intentional. In Washington, a defendant is not entitled to the defense  
 22 of self-defense if the force used was accidental, *State v. Gogolin*, 45 Wn. App. 640, 643 (1986),  
 the government dismissed the charges against Doucette without prejudice, Dkt. 17 at 39, and  
 there is no statute of limitations for murder or manslaughter.

1 With regard to the Estate's and the Doucettes' motions, the Court denies these  
2 motions because disputed issues of material fact exist. If State Farm discovers facts to  
3 conclusively show that no "altercation" occurred and Doucette fired the fatal shots from  
4 some distance, then it appears that Washington law precludes coverage because the  
5 shooting would not be an occurrence under the policy. In the absence of that factual  
6 issue being resolved, State Farm is entitled to defending under a reservation of rights.  
7 Accordingly, the Court denies the Estate's and the Doucette's motions without prejudice  
8 on this issue.

9 **C. Duty to Indemnify**

10 The duty to indemnify "hinges on the insured's actual liability to the claimant and  
11 actual coverage under the policy." *Woo v. Fireman's Fund Ins. Co.*, 161 Wn.2d 43, 53  
12 (2007) (citing *Hayden v. Mut. of Enumclaw Ins. Co.*, 141 Wn.2d 55, 64 (2000)).

13 In this case, all parties seek a ruling on State Farm's duty to indemnify. The  
14 parties' motions, however, are premature. When actual liability is determined, the Court  
15 will address this issue. Liability may be determined in a number of ways, including jury  
16 verdict or a dispositive ruling on the issue of whether Mr. Doucette's actions were  
17 intentional. Until such time, the Court declines to issue advisory opinions on the duty to  
18 indemnify. Therefore, the parties' motions are denied as moot.

19 **III. ORDER**

20 Therefore, it is hereby **ORDERED** that (1) on the issue of the duty to defend,  
21 State Farm's motion, the Estate's and the Doucette's motions (Dkts. 16, 18, 19) are  
22

1 || **DENIED** without prejudice and (2) on the issue of the duty to indemnify, all the  
2 || motions are **DENIED** as premature.

Dated this 14th day of September, 2016.

  
\_\_\_\_\_  
**BENJAMIN H. SETTLE**  
United States District Judge